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No. 71-1086

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN A. MASIELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

No opinions were filed by the court of appeals or the district court.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1972 (Pet. App. 3a–4a) and rehearing was denied on January 26, 1972 (Pet. App. 1a–2a). The petition for certiorari was filed on February 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

462-916—72——1

QUESTIONS PRESENTED

1. Whether the conviction was tainted by a seizure challenged as illegal.

2. Whether the conviction was improper because petitioner was entrapped.

3. Whether the duties which an agent was bribed to violate were properly established by official Regulations and Rules of Conduct promulgated by the Treasury Department and the Internal Revenue Service.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of bribing and of conspiring with William Williams to bribe a revenue agent of the Internal Revenue Service, in violation of 18 U.S.C. 201 and 18 U.S.C. 371. (R. 3a–8a).[1]

In November 1968, a revenue agent, Lawrence Ruggiero, reported to the Inspection Division of the Internal Revenue Service that a former Internal Revenue Service special agent, William Williams, had confided to Ruggiero that widespread corruption existed in the local Internal Revenue Service office. The Inspection Division thereupon asked Agent Ruggiero to "assume the role of a corrupt revenue agent," and, thereafter, Ruggiero met once or twice a week with Williams, who represented various taxpayers whom Agent Ruggiero was auditing (R. 22a–24a).

In April 1969, Special Agent Bruh was assigned by the Internal Revenue Service to a criminal tax inves-

[1] "R." refers to the record appendix filed in the court of appeals.

tigation of petitioner for the tax years 1965, 1966 and 1967, and he determined that petitioner had filed no tax returns for those years (R. 9a–12a).

When Agent Ruggiero's undercover assignment was initiated, it was not related to any investigation of petitioner (R. 66a–67a), but on September 18, 1969, Ruggiero was told by Williams that he had a later appointment with petitioner. Thereupon, Ruggiero stated he could possibly get petitioner's tax returns assigned to himself, and Williams urged him to do this, so that Ruggiero could furnish information to petitioner concerning Special Agent Bruh's fraud investigation (R. 26a–28a, 65a). Williams stated he would speak to petitioner about paying Ruggiero for this information and, on the following day, the agent was informed by Williams that petitioner said the arrangement was "fine" and he would pay $250 per month "just for information" about the investigation by Special Agent Bruh (R. 26a–30a). The agent was also told by Williams that separate payments would be made for such additional help as reducing petitioner's tax liability (R. 69a).

Official information was, with the approval of the revenue agent's superiors, disclosed by the agent to Williams concerning the decision of the Internal Revenue Service temporarily to suspend efforts to collect on a $50,000 assessment against A. & R. Corporation, for which petitioner might be personally liable. He also disclosed that Special Agent Bruh was investigating a $3,000,000 bank account in Florida which might possibly belong to petitioner (R. 33a–40a).

On December 6, 1969, Agent Ruggiero met with petitioner. At this meeting, Williams told petitioner that further meetings of petitioner with the agent were not necessary, that Williams would handle matters, and the agent was their only source of information. Williams suggested to petitioner that Agent Ruggiero be "put on the payroll for $250 a month." Petitioner said he had been using Williams for years, that the arrangement with Ruggiero was all right, and that he wished to find out what was on the mind of Special Agent Bruh. Information concerning the suspension of efforts to collect the $50,000 assessment and the Florida bank account was also discussed by Ruggiero with petitioner and Williams at the December 6, 1969, meeting (R. 46a–48a). On December 9, 1969, Agent Ruggiero was given $200 in cash by Williams, who kept $50 for himself (R. 50a).

Agent Ruggiero testified that he was not authorized to disclose any of this information in the absence of specific authorization from the Inspection Division of the Internal Revenue Service (R. 59a). For the purpose of establishing the duty of an agent not to disclose official information without specific authorization, the government introduced into evidence certain excerpts from publications of the Treasury Department [2] and of the Internal Revenue Service.[3]

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[2] Standards of Conduct for Employees of the Treasury Department. 31 C.F.R. 0.735.47. (Exhibit 10; R. 88a. 100a.)

[3] Rules of Conduct for Internal Revenue Service Employees. (Exhibit 11; R. 88a, 100a–101a.)

Petitioner introduced no evidence in his own defense. The district court denied petitioner's motion to set aside the verdict of guilty (R. 2a), and the conviction was affirmed by the court of appeals (Pet. App. 3a–4a).

ARGUMENT

1. Petitioner contends, for the first time in this Court, that the tax audit, investigation, criminal charge, prosecution and conviction were tainted by a prior, allegedly illegal, seizure of records of certain corporations in which petitioner was a shareholder (Pet. 6). However, the legality of that seizure, which was made incident to executing an arrest warrant issued on the basis of an indictment which included the corporations, was upheld in a prior criminal proceeding, in which petitioner was convicted of a different bribery charge. *United States* v. *Masiello,* 434 F. 2d 33 (C.A. 2) (remanding for further hearing); *United States* v. *Masiello,* 445 F. 2d 1324 (C.A. 2) (conviction affirmed), certiorari denied, January 24, 1972 (No. 71–656).

Even assuming the primary illegality asserted by petitioner, he nevertheless failed to establish that this tax case resulted through exploitation of the seized records. *Hoffa* v. *United States,* 385 U.S. 293, 309. By his failure to raise the issue below, petitioner foreclosed a determination on possible attenuation of the asserted illegality. See *Costello* v. *United States,* 365 U.S. 265, 278–280; *Lanza* v. *New York,* 370 U.S. 139, 145–146; *Wong Sun* v. *United States,* 371 U.S. 471,

491. Petitioner's failure to raise this issue by timely motion or objection should preclude further appellate considerations of his present contention. *Rugendorf* v. *United States*, 376 U.S. 528, 535; *Frazier* v. *United States*, 335 U.S. 497, 503.

Finally, the illegality of an investigation would be no defense to an act of bribery committed by the suspected person. See *Dennis* v. *United States*, 384 U.S. 855, 856; *United States* v. *Knox*, 396 U.S. 77.

2. Similarly, there is no merit in petitioner's contention (Pet. 7) that the defense of entrapment is so strongly indicated on the record as to make his conviction plainly erroneous, despite his conceded failure to raise the issue in the courts below. In fact, petitioner affirmatively disclaimed reliance on this defense (R. 73a). The facts show (Statement, *supra*) that petitioner had previously employed Williams to secure unauthorized disclosures of official information (R. 48a, 65a). As petitioner was merely offered an opportunity to commit bribery, there was no basis for an entrapment defense. *Sherman* v. *United States*, 356 U.S. 369, 372; *Sorrells* v. *United States*, 287 U.S. 435, 441; *United States* v. *Comi*, 336 F. 2d 856, 859–860 (C.A. 4).

3. Finally, petitioner contends (Pet. 8–9) that the administrative rules and regulations were an improper basis for establishing the official duties petitioner is charged with bribing the agent to violate. But it has long been settled that such regulations have the force

of law and that inducing an official to violate them constitutes a crime under Section 201(b)(3), which forbids inducing a public official from doing "any act in violation of his lawful duty." See *Haas* v. *Henkel*, 216 U.S. 462).

In *Haas*, the indictment charged a conspiracy to bribe a Department of Agriculture employee to give out advance information about monthly cotton reports in violation of the Department's written and published regulation that no crop information should be divulged without the written approval of a bureau chief. This Court flatly rejected defendant's contention that no offense could be made out because there was no formal statute prohibiting the giving out of such official secrets. As the court below had said:

> "The words 'lawful duty' are not to be considered as duty imposed by law or statute, but as duty lawfully imposed in any way * * *. The usage and the regulations in question were intended for the government of the department, [and] were entirely consistent with law * * *. They were therefore lawfully imposed on * * * [the Department employee] and it was his duty to obey them. Although his failure to do so may not be a crime, because no statute has made it so, still section 5451 [now section 201(b)] does make it a crime for any one, by the payment of money, etc., to induce him to violate this lawful duty." [*Haas* v. *Henkel*, 166 Fed. 621, 627 (S.D. N.Y.].

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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